State of Utah

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Lieutenant Governor

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May 27, 2004

Ms. Leslie Van Frank, Esq.
Cohne, Rappaport & Segal, P.C.
525 East 100 South, Suite 500
Salt Lake City, UT 84102

Subject: Amended Order, File No. 98-01, Reagan Outdoor Advertising General, Inc.

Dear Ms. Van Frank:

Enclosed is an Amended Order with respect to the "Three Signs", File No. 98-01. If you have any questions, please feel free to contact me.

Sincerely,

David K. Miles, P.E.
Administrative Hearing Officer

DKM:js

Cc: Mark Burns, AG's Office
Edward Rogers, Utah Outdoor Advertising
Preston Howell, Attorney, Republic Outdoors Advertising
Shawn Debenham, UDOT Region Two
Lyle McMillan, UDOT, ROW
Jim Beadles, UDOT/AG's Office

Amended Order

Reagan Outdoor Advertising General, Inc. v. Region Two, Utah Department of Transportation

File No. 98-01

Introduction & Background:

On February 17, 1998, Reagan applied for outdoor advertising permits with Region Two to relocate three outdoor advertising sign structures from what was then their locations on the west side of I-15 at approximately 2890 South to various nearby locations, i.e., the Swanson Building Materials property; the National Wood Products property, and the Lawson-Snider/Lindel Cedar Homes property.

Region Two denied the request on the grounds that I-15 was then being reconstructed and the proposed locations would be inappropriate under the new configuration. Reagan appealed to UDOT's administrative hearing officer, who denied the appeal. Reagan then petitioned for judicial review in Third District Court.

After prolonged settlement discussions, the district court agreed to a stipulation of the parties and vacated the department's order. The court dismissed the case without prejudice. Consequently, the matter is now once again before UDOT's hearing officer.[1] Based on an unrelated case in the Second Judicial District Court, *UDOT v. Zito*, Region Two and Reagan entered into a stipulation by which Region Two withdrew its objection to Reagan's permit applications for the remaining two signs.[2] Reagan agreed to drop its

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[1] The sign proposed for the Lawson-Snider/Lindal Cedar Homes property was the subject of a January 23, 2003 UDOT order that reversed the Region's 1998 denial for that property because the proposed sign was not, in fact, within 500 feet of an intersection, contrary to the Region's 1998 conclusion. Therefore, since that relocation has already been permitted, this case, though colloquially referred to as the "Three Sign" case, actually only involves two signs. UDOT will resist the temptation to make this case more confusing by naming it the "Two Sign" case.

appeal, remove a single-sided sign south of the 2700 South overpass on the west side of I-15, and not pursue any permit to alter the height of its outdoor advertising sign north of the 2700 South overpass on the west side of I-15 as long as the sign is considered non-conforming. The parties jointly agreed to seek an order from UDOT's hearing officer reversing and vacating the 1998 denial of the remaining two permits.

Analysis & Findings:

The undercurrent for the stipulation appears to be the belief that *Zito*, while not controlling, was a correct statement of the law and that if Region Two's denial in this case were litigated further in the court system, it would end in a *Zito*-like fashion.

However, I am of the opinion that conceding error on the basis of *Zito*, without further analysis is not an appropriate way to guide and inform UDOT's permit officers and the billboard industry. Though I agree with Region Two's and Reagan's ultimate conclusion that it was wrong to deny the permit application without first having a rule, I must do so for more convincing reasons. Otherwise, absent a clear showing that the agency is wrong, I assume that the permit officers did their jobs correctly.

Administrative rulemaking serves many purposes, with one of the more important being the announcement to the public of the law. *Williams v. Public Service Comm'n*, 720 P.2d 773, 777 (Utah 1986) (striking down internal policy that had general applicability because "adequate advance notices to all affected parties, an opportunity to

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[2] The parties represent that the *Zito* court ruled that, absent an administrative rule allowing it, UDOT lacks the authority to deny a permit on the basis of future construction. That is, when Region Two evaluated the permit's legality, it did so as if the planned and, in fact, ongoing construction had already been completed. Thus, the I-15 upon which the permit officers were evaluating the application to was substantively different than the I-15 as it existed on the ground. Though it appears the *Zito* case may have involved facts that are starkly different from this one, i.e., planned rather than ongoing construction, both parties interpret the district court decision as stating that the permit officers may only look at a road in its pre-built condition. Thus, according to this interpretation, Region Two's denial was incorrect.

participate, and an opportunity to comment on the proposed rule"). A law passed by the Utah Legislature in 2003 further evidences the importance of public notice in the rulemaking process.

During that session, the Legislature passed a bill that limited an agency's power to develop "secret rules" under the guise of internal policies. 2003 Laws of Utah, Chapter 197. The law specifically provides that written statements do not have the force of law unless they are enacted as administrative rules. Indeed, in the specific area of outdoor advertising, the Legislature has long recognized that rules must be sent to all permit holders.[3] Utah Code Ann. § 72-7-506(2)(a).

The Utah Supreme Court, in *Williams*, provided yet another reason to require an administrative rule in this instance, i.e., to inform the public when an agency is departing from current policy and practice or "making a change in clear law." 720 P.2d at 776, *quoting* 2, K. Davis, *Administrative Law Treatise* § 7:25, at 122 (1978). UDOT recently completed an informal survey of attorneys for other departments of transportation. Not one of the agencies that responded had a rule on this issue. More significantly, the overwhelming majority stated that they had not considered the issue.

If law is fairly settled and well-interpreted, a rule is less necessary, both because it is well known, there is no need for agency interpretation, and there is no change in clear law. Here, however, it appears there is a complete lack of law and a need for agency interpretation.[4] In that case, the need for a rule is even more compelling, making UDOT's failure to issue a rule all the more damning.

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[3] Proposed rules do not have to be sent out before they become effective, however.

[4] The effort needed to develop and issue a rule will also UDOT to carefully consider the various factors that should play into the distinction between planned construction and ongoing construction, for example, or between a design-build project and a regular project.

Given the importance of rulemaking in these circumstances and the department's failure to issue a rule covering the issues discussed in this order, I must conclude that UDOT's denial of Reagan's permit was inappropriate.

Order

Region 2's denial of the permit application for the two signs that are still subject to appeal is reversed. I also reiterate that should UDOT choose to review outdoor advertising applications pursuant to a planned or under-construction alignment, it must issue an appropriate administrative rule before doing so.

DATED THIS 27th day of May, 2004.

David K. Miles, P.E.
Administrative Hearing Officer